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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1907

No. 269

FORT SMITH LIGHT AND TRACTION COMPANY, PLAINTIFF IN ERROR,

vs.

BOARD OF IMPROVEMENT OF PAVING DISTRICT No. 16 OF THE CITY OF FORT SMITH, ARKANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED JANUARY 18, 1908

(21,615)

(31,615)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 892

FORT SMITH LIGHT AND TRACTION COMPANY, PLAINTIFF IN ERROR,

vs.

BOARD OF IMPROVEMENT OF PAVING DISTRICT No. 16 OF THE CITY OF FORT SMITH, ARKANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX

(omitted in printing)

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 1, 1926

[fol. 1] **IN CIRCUIT COURT OF SEBASTIAN COUNTY, FORT SMITH DISTRICT**

BOARD OF IMPROVEMENT OF PAVING DISTRICT NO. 16, Plaintiff,

vs.

FORT SMITH LIGHT & TRACTION COMPANY, Defendant

BILL OF COMPLAINT

Now comes the plaintiff and for its cause of action herein against the defendant, says:

That Paving District No. 16 of the City of Ft. Smith, Arkansas, is an Improvement District and a public quasi corporation duly organized and existing under the laws of the State of Arkansas relative to the formation of improvement districts in cities and towns. That said Improvement District was duly and properly created and organized under said laws relative to the formation of improvement districts in cities and towns for the purpose of paving certain streets and avenues in the City of Fort Smith, Arkansas, including, among others, the following streets, to wit:

(1) Garrison Avenue from Second Street to its eastern terminus, including the intersection of Garrison Avenue with North and South Second Streets.

(2) North Third Street from Garrison Avenue to North A Street.

(3) North Fifth Street from Garrison Avenue to North A Street, including its intersection with North A Street.

That the City of Fort Smith is a city of the first class in the State of Arkansas.

That the defendant, Fort Smith Light & Traction Company, is a corporation duly organized and existing under [fol. 2] the laws of the State of Arkansas, with its principal place of business at Fort Smith, in said State.

That said defendant owns and operates a street railway on, along and across a number of streets and avenues in the City of Forth Smith, and that it operates its lines

of street railway on, along and across the streets and avenues specifically above mentioned, to wit: Garrison Avenue from Second Street to its eastern terminus, including the intersection of Garrison Avenue with North and South Second Streets; north Third Street from Garrison Avenue to North A Street; North Fifth Street from Garrison Avenue to North A Street; including its intersection with North A Street.

That prior to the — day of ——, 1919, said Fort Smith Light & Traction Company operated its street railway on, along and across streets and avenues in the City of Fort Smith, including the streets above mentioned, under a franchise granted to it by said City of Fort Smith, which said franchise, among other things, required said Street Railway Company to pave between its rails with the same character of pavement that the balance of the street was paved with, and to maintain the pavement between its rails and two feet on each side thereof.

That on said — day of ——, 1919, said defendant surrendered its said franchise in accordance with the provisions of Section 15 of Act No. 571 of the Acts of the General Assembly of the State of Arkansas, for the year 1919, and that on said date an indeterminate permit was [fol. 3] issued to it by the Arkansas Corporation Commission, in accordance with the provisions of said Act No. 571, and that from said — day of ——, 1919, down until the day of the filing of this complaint said defendant has operated its street railway in the City of Fort Smith and on, along and across the streets and avenues above mentioned, under and by virtue of said indeterminate permit issued on said — day of ——, 1919, by the Arkansas Corporation Commission.

That prior to April 5th, 1923, the Board of Improvement of Paving District No. 16 of the City of Fort Smith, Arkansas, adopted final plans for the paving of the streets and avenues within said district, including the streets and avenues specifically mentioned, which were at that time, and still are, occupied by the street railway tracks of the defendant, and that prior to said 5th day of April, 1923, said Board of Improvement of Paving District No. 16 had finally determined upon the material to be used upon the streets and avenues in said District, including the streets

and avenues specifically above mentioned, and which were then, and still are, occupied by street railway tracks of said defendant.

That on said 5th day of April, 1923, said Board of Improvement of Paving District No. 16 of the City of Fort Smith, Arkansas, caused to be served upon said defendant a notice in writing stating the character of material to be used upon the balance of said three streets specifically above mentioned, and directing said defendant to proceed with the work of paving between the rails and to the end of its ties on said three streets; that said notice was in the [fol. 4] form prescribed by Section R of Act No. 680, of the Acts of the General Assembly of the State of Arkansas, for the year 1923, and was given in accordance with the provisions of said Act No. 680; that said notice was in due and proper form and that service of said notice was duly accepted in writing by said Light & Traction Company on said 5th day of April, 1923; that said original notice, together with the original acceptance of service thereof, is attached to this complaint and made a part hereof and marked "Exhibit 1".

That said defendant failed to start said paving within thirty days, to wit: the pavement between the rails and to the end of its ties, on the streets specifically mentioned above, viz:

Garrison Avenue from Second Street to its eastern terminus, including the intersection of Garrison Avenue with North and South Second Streets.

North Third Street from Garrison Avenue to North A Street.

North Fifth Street, from Garrison Avenue to North A Street, including its intersection with North A Street.

And that said defendant specifically and definitely refused to lay said paving between said rails and to the end of its ties above mentioned; that more than thirty days having expired since the service of said notice and said defendant having failed and refused to start said paving said Paving District No. 16, through its Board of Improvement, proceeded to pave said three streets above mentioned, including the pavement between said rails, and to the end of its ties of the track operated by said defendant, on, along and across said three streets and avenue, all

in accordance with the final plans theretofore adopted by [fol. 5] said Board of Improvement of Paving District No. 16, and with the material mentioned and set forth in said notice; that the amount expended by said Board of Improvement of Paving District No. 16 of the City of Fort Smith, Arkansas, in paving said space between the rails and to the end of the ties of the tracks of the defendant on said three streets and avenues specifically above described was the sum of $11,780.19; that $11,272.97 of said amount was paid by said Paving District No. 16 to the Kaw Paving Company on November 20, 1923, for actual work and material in paving said space between the rails and to the end of the ties of the tracks of the defendant on said three streets and avenues, and that $507.22 of said amount was paid by said Paving District No. 16, on December 13, 1923, to W. L. Winters for engineering services for supervising and inspecting the work of laying said pavement between the rails and to the end of the ties of the tracks occupied by said defendant on said three streets. That an itemized statement of the amount so expended by said Paving District No. 16, in paving said space between the rails and to the end of the ties of the tracks of the defendant on the streets above mentioned was presented to the defendant on December 13, 1923, and payment thereof was demanded of said defendant at that time; that payment was refused and denied by said defendant at that time on the sole ground that liability was denied; that said itemized statement together with the refusal of the defendant endorsed thereon is attached hereto and made a part of this complaint and marked "Exhibit 2."

Wherefore, premises considered, plaintiff prays that it have judgment against said defendant for the sum of $11,- [fol. 6] 272.97, together with interest thereon from November 20, 1923, at the rate of ten per cent per annum, and for the further sum of $570.22, together with interest thereon at the rate of ten per cent per annum from December 13th, 1923, together with all its costs in this behalf laid out and expended.

George Dodd, Daily & Woods, Attorneys for Plaintiff.

[fol. 7] In Circuit Court of Sebastian County

[Title omitted]

Answer

Comes the Fort Smith Light & Traction Company and, in answer unto the complaint herein, alleges:

First

The defendant admits that Paving District No. 16 of Fort Smith, Arkansas, was organized as stated in the complaint, and that the defendant is a corporation as therein stated, owning and operating a street railway system in the City of Fort Smith.

The defendant alleges that it has twenty-six (26) miles of street railway in said city, including the lines mentioned in the complaint, which constitute about two miles, including the double track on Garrison Avenue.

That it is true that prior to August 15, 1919, the defendant operated in said city under franchises granted by the city, which franchises were in the form of ordinances, duly accepted by the defendant, or its predecessor in title.

That it is not true that the defendant prior to said 15th day of August, 1919, operated its street railway on the streets mentioned in the complaint under franchises granted it by the city, which franchises, among other things, required said street railway company to pave between its rails with the same character of pavement that [fol. 8] the balance of the street was paved with and to maintain the pavement between its rails and for two feet on each side thereof, and alleges the facts to be:

That it was operating its street railway system under three ordinances, each duly accepted by it, or its predecessor in title, to wit: Ordinance No. — passed and approved August 2, 1881, granting a franchise to the Fort Smith Street Railway Company to construct, maintain and operate a single or double track railway for a period of thirty (30) years on certain streets therein named, among others Garrison Avenue, and Ordinance No. 453, passed and approved February 7, 1898, granting the Fort Smith Street Railway Company, its successors or assigns, au-

thority to propel its cars with electric motors and other means, and conferring additional rights upon said Company, and providing that if said Company would comply with certain conditions therein named, which the Company did comply with, that all rights granted to said Company, its successors or assigns, should be granted for a period of fifty (50) years from the passage and publication of the Ordinance, and that all rights theretofore granted said Fort Smith Street Railway Company were extended for a period of fifty (50) years from the passage of the Ordinance, and Ordinance No. 694, passed and approved November 20, 1905, whereby the privileges and franchises granted the Fort Smith Street Railway Company, its successors and assigns, by Ordinance No. 453, were extended, granted, given and vested in this defendant Company for and during the period and term of fifty (50) years from and after the passage and publication of said ordinance, and the said ordinance granted to this defendant other rights and privileges therein set out, and placed upon it [fol. 9] certain burdens and obligations therein set out, which this defendant accepted.

That this defendant had up to August 15, 1919, operated with the consent of the City of Fort Smith, under and pursuant to said ordinances and some amendments thereto accepted by the defendant, which have no bearing on the issue herein presented, and said ordinances constituted a contract between the City of Fort Smith and this defendant, which contract was existing and the only contract existing between the City of Fort Smith and this defendant on August 15, 1919.

That the only provision in the franchise above referred to relating to street paving was in Ordinance No. 453, which was as follows:

"Provided that the Street Railway Company shall, when the balance of the street is being paved, at its own expense pave between the rails and tracks of said street railway on all streets where tracks are now laid or may hereafter be laid with the same material and in like manner and condition as may be authorized by ordinance or law, and the said Street Railway Company shall at all times provide safe and suitable crossings at all crossroads for wagons or other vehicles and the said crossings, street railway and

pavings shall at all times be kept in safe condition and good repair, and the said Street Railway Company shall keep its tracks in good repair between the rails."

That said Ordinances imposed by various provisions on this defendant certain obligations which the City could not [fol. 10] impose except by contract, to wit:

(a) The aforesaid obligations of the Company to pave between its rails when a street was paved.

(b) That the rate of charge should be five cents per passenger, and requiring transfer privileges from one line to the other, and that school children should enjoy a one-half fare, and that firemen and policemen in uniform should be carried free.

That in addition thereto there were certain regulatory provisions, some of which the city had a right to impose, and others resting in the accepted provisions of the ordinances.

That said ordinances granted valuable rights to the defendant, among others, to wit:

(A) That Ordinance No. — of August 2, 1881, granted the Fort Smith Street Railway Company an exclusive franchise to operate on various streets in the city, which it did thereunder, among others Garrison Avenue, North Eleventh Street, Towson Avenue and Little Rock Avenue, and that said streets, particularly Garrison Avenue, were valuable streets in the city for street car purposes and the exclusive right thereupon was a valuable right.

That said franchise was extended for fifty (50) years by Ordinance No. 453, in 1898, and that the rights in said Ordinance No. 453 granted to the Fort Smith Street Railway Company were granted to this defendant and extended for a period of fifty (50) years from the date thereof, November 20, 1905.

That said ordinances Nos. 453 and 694 not only continued the exclusive franchises on the street named in Ordinance [fol. 11] No. — of 1881, but granted to this defendant franchises on various other streets which had not been occupied and some of which have not yet been occupied, but under the terms of said ordinances, on August 15, 1919, the defendant had a right to occupy these various

other streets which had not been occupied and built upon, which was a valuable right at that time.

(B) That Ordinance No. 453 extended by Ordinance No. 694 for a period of fifty (50) years, granted to the defendant, its successors and assigns, the right to carry mail, express and baggage, which was a valuable right, and a continuing right, on August 15, 1919.

(C) Said Ordinance No. 453 extended for fifty (50) years by Ordinance No. 694 granted the defendant, its successors and assigns, the right to convey its rights and privileges under said ordinances and to consolidate with other companies and to assign its stocks to non-residents without affecting its rights, which said rights were existing on August 15, 1919, and were valuable rights.

That there were other burdens and other rights set out in said ordinances of value to the City of value to the defendant.

That the General Assembly of 1919 passed Act No. 571, approved April 1, 1919, and by Section 15 thereof authorized any public utilities operating under franchises to surrender the same in the manner therein set out and that upon compliance therewith the Corporation Commission should issue to such utility an Indeterminate Permit.

That said Act prescribed the rights and obligations of [fol. 12] utilities operating under Indeterminate Permits and gave the consent of the State to the surrender of all contractual obligations of public utilities made with municipalities assumed in franchises passed by municipalities and a surrender of all rights obtained by public utilities through such franchises from municipalities, thereby authorizing the rescission of all existing contracts in the form of franchises between municipalities and public utilities, and in lieu thereof granted rights and obligations as set forth in said Act, and that the Company receiving an Indeterminate Permit thereunder should be freed of all of its prior contractual obligations and divested of all of its prior contractual rights under franchises between it and the municipalities.

That pursuant to said Act this defendant surrendered all of its franchises, including the franchises under which it was operating, and on August 15, 1919, received an In-

determinate Permit under the hand and seal of the Corporation Commission, which said Indeterminate Permit is as follows, to wit:

"Arkansas Corporation Commission, Little Rock, Ark.

August 15, 1919.

Case No. 53

In the matter of the application of Fort Smith Light & Traction Company for certificate of indeterminate permit to operate a street-railway system, an electric light and power plant, and a natural and artificial gas distribution system in the cities of Fort Smith and Van Buren, Arkansas, and vicinities adjacent thereto.

[fol. 13] Certificate of Indeterminate Permit

The Fort Smith Light & Traction Company having on this day filed with the Commission its application for a Certificate of Indeterminate Permit to maintain and operate a street railway system, an electric light and power plant and a natural and artificial gas distribution system in the cities of Fort Smith and Van Buren, Arkansas, and the vicinities adjacent thereto; and it being made to appear by evidence satisfactory to the Commission that said applicant is a corporation, duly organized and existing under and by virtue of the laws of the State of Arkansas, and has for a number of years owned and held franchises from the cities of Fort Smith and Van Buren, authorizing it to maintain and operate the utilities aforesaid in said cities, and that said applicant is now, and for a considerable period of time has been, actually engaged in the operation of said utilities in said cities by virtue of said franchises, and that said applicant did, on August 14, 1919, file with the Clerk of each of said municipalities a written declaration legally executed, surrendering all of said franchises heretofore issued to it by said municipalities, and that by reason of said facts said applicant is now, by operation of law, entitled to receive, in lieu of said franchises, an Indeterminate Permit under the terms of Act 571 of the Acts of the General Assembly of Arkansas for the year 1919.

Now, therefore, the Arkansas Corporation Commission does hereby certify that the said Fort Smith Light & Traction Company is, on and after this date, entitled to and the holder of an indeterminate permit to maintain and operate each and every of the utilities herein above mentioned and described, in the vicinity aforesaid.

[fol. 14] By the Commission.

Guy A. Freeling, Secretary. (Seal.)"

That the obligation heretofore set out requiring this defendant to pave between its rails when streets were paved, thereupon ceased and determined, and no other or further obligation rests upon this defendant to pave between its rails, or otherwise.

That under Section 16 of said Act 571 it was provided that any municipality should have the power subject to the provisions of the Act to acquire by purchase, or otherwise, any plant operating under an Indeterminate Permit under the terms prescribed in said Act, which said right was a valuable right which the State secured in behalf of the municipality when this defendant surrendered its franchises.

That the General Assembly of 1921 passed Act 124, approved February 15, 1921, whereby the Corporation Commission, which was created by Act 571 of 1919 was abolished and the power of regulation in Act 571 vested in the Corporation Commission over public utilities was by said Act vested in municipalities, wherein said public utilities operated.

That Section 15 of Act 124 provided public utilities operating under Indeterminate Permits granted under Act 571 of 1919, might elect to reinstate their franchises and continue to operate under them as they had before surrendering the same, if the said utilities surrendered their Indeterminate Permits and said Section 15 further provided that should the companies operating under Indeterminate Permit elect not to reinstate their franchises under [fol. 15] the terms of said Section that such companies should be permitted to continue to operate under such Indeterminate Permits under the terms and conditions specified in said Indeterminate Permit, but subject to regulation in the same manner and to the same extent and with like force and effect as in the case of other and like utilities.

That this defendant elected to continue to operate under its Indeterminate Permit under the terms of said Act 571 as continued in force by said Act 124 of 1921. That the Act referred to in the complaint, to wit: Act 680, of the General Assembly of 1923, approved on March 26, 1923, is an attempt by the General Assembly to require a company operating a street railway as a public utility under Indeterminate Permits to pave between its rails and to the end of its ties on streets occupied by it when said streets are paved by the city, the county, or improvement district, thereby seeking to place upon companies operating under Indeterminate Permits different obligations than companies operating under franchises, contrary to the provisions of Act 571 and contrary to the provisions of Act 124 of 1921.

That the defendant alleges that the right of regulation and the right to have burdens imposed upon it are limited by the terms of said Act 571 and Act 124, and that the attempt to add other and different burdens upon this defendant because it is operating under an Indeterminate Permit than other companies operating in the state under franchises is an impairment of the obligation of the contract, contrary to Article 1 of Section 10 of the Constitution of the United States, and contrary to Article 2, Section 17, of the Constitution of Arkansas.

[fol. 16] The defendant further states that said Act 571 of 1919 and the Indeterminate Permit granted under and pursuant to its terms and Act 124 of 1921 constitute a contract between the State and this defendant, as the company elected to continue to operate under the Indeterminate Permit pursuant to the authority of said Acts and that under and pursuant to the authority of neither of said Acts had the State or the municipality any right or power to compel this defendant when a street occupied by it was paved by the city, county or an improvement district to pave between its rails and to the end of the ties thereof, and that said Act 680 of 1923, approved March 26, 1923, is an attempt on the part of the State, through said Act to impair the obligation of a contract and is void as in conflict with Article 1, Section 10, of the Constitution of the United States, and Article 2, Section 17, of the Constitution of Arkansas, and this defendant expressly sets up and relies upon Article 1, Section 10, of the Constitution

of the United States, and the rights, privileges and immunities therein granted to it to be protected against the impairment of a contract, and alleges that for reasons herein stated, said Act 680 and all proceedings had thereunder by the plaintiff herein are void so far as the same seek to impose the obligations sued for upon this defendant.

Wherefore the defendant prays to be dismissed with its costs and all other and further relief to which it may be entitled.

Second

That said Act 680 of 1923 referred to in the complaint under which the plaintiff is seeking to recover was an [fol. 17] arbitrary Act of the General Assembly and is void as denying the defendant equal protection of the law and depriving it of property without due process for the following reasons:

That in the year 1912 the City of Fort Smith and an improvement district jointly undertook to pave Garrison Avenue, which is the principal business street of the City of Fort Smith, nearly one mile in length, and the defendant then had a double track thereon from First Street to Thirteenth Street.

That at that time the defendant was under the franchise obligation hereinbefore set out to pave between its rails when the street was paved, as set out in paragraph one of this answer. The city and the improvement district decided to pave said street with creosoted blocks of wood, and an agreement was reached between the city and improvement district on the one side and this defendant on the other, by which the defendant, instead of paving with wooden blocks should pave between its tracks and a short space on either side with brick, and in accordance with said agreement the defendant constructed the brick pavement and the city and improvement district constructed the wooden block pavement.

That the paving done by the city and improvement district proved to be inadequate to stand the traffic and weather conditions, and in a few years proved wholly insufficient and fell into bad repair and got into such condition that at the end of ten years it had to be entirely discarded and

a new pavement constructed, and for that purpose the plaintiff district was formed.

That at the time the plaintiff District was formed the [fol. 18] pavement constructed by the defendant was in good useable condition and entirely adequate to stand the traffic imposed upon it and would have been adequate for a number of years. The paving constructed by the defendant would have been in better condition than it was, although in fairly good condition, had it not been for the poor paving done by the city and the improvement district which from time to time squeezed the brick pavement constructed by the defendant, causing it much damage and putting the defendant to much expense from time to time to repair it, and for the further reason that owing to the bad condition of the paving done by the city and the improvement district much more traffic used the brick pavement than otherwise would have done, thereby placing a greater burden upon it than was contemplated, yet at the time of the creation of the plaintiff district there was no necessity of the repaving of that part of the street which had been paved by this defendant.

That the plaintiff district tried to get the defendant to pave between its tracks, which it declined to do, because it was then under no legal obligation to do so and because it had been to great expense and had done the paving required of it and there was no necessity for repaving that part of the street which had been constructed by it, or if a necessity did exist for that repaving, it was on account of the poor paving done by the city and the improvement district and the damage which that pavement had done to the brick pavement constructed by the defendant.

That thereupon the plaintiff district was organized and in the organization obtained the consent of a majority of [fol. 19] the owners of real property in the district and levied assessments to pay for the paving of Garrison Avenue and the parts of the streets named in the complaint, which said assessments were sufficient to pay for the entire paving, including the cost of that part which is now sought to be imposed upon this defendant.

That after said district was organized and the assessments levied as aforesaid the plaintiff caused a bill to be drawn seeking to place upon the defendant the obligation

of which it had been relieved in the surrender of its franchise, and in fact the obligation sought to be imposed through said bill was greater than had been imposed in the franchise which has heretofore been set out.

That under Article V, Section 26, of the Constitution of Arkansas the General Assembly is prohibited from passing any local or special act, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of the bill for such an Act.

That at the time the said bill for the Act referred to was prepared the General Assembly was then in session.

The bill was drawn as a general act applicable to all companies operating under Indeterminate Permits and in such form was introduced into the General Assembly without any prior notice of its introduction being given.

That at that time there were only two companies operating a street railway in cities of the first class in Arkansas under Indeterminate Permits. This defendant company, [fol. 20] which was operating in Fort Smith and Van Buren, and a company operating in Texarkana, Miller County.

That the defendant was operating in Van Buren under a franchise similar in all respects to Ordinance 694 of the City of Fort Smith heretofore referred to, which it had surrendered and received an Indeterminate Permit in lieu thereof.

That at that time there was a street railway being operated in the following cities of Arkansas, to wit: Argenta, Eureka Springs, Fort Smith, Van Buren, Helena, Hot Springs, Little Rock, Pine Bluff, Texarkana and Walnut Ridge.

That all of said companies, except this defendant and the one operating in Texarkana, were operating under franchises granted by the various municipalities in which they operated and the franchises therein determined the obligations of the companies in regard to paving; some of them required paving to be done substantially as was required by the ordinances of the cities of Fort Smith and Van Buren, while others placed no such obligation upon the

street car companies, and still others placed different obligations on the street car companies.

That the bill as introduced was an exact copy of Act 680, except a provision in Section 5 thereof, and on its face appeared as a general Act applicable to all persons, firms or corporations operating any street railway on any street, or avenue in any city of the first class in the state under and by virtue of an Indeterminate Permit issued by the Arkansas Corporation Commission.

The bill after introduction in the House was referred to [fol. 21] a committee and was amended in committee by inserting in Section 5 these words, to wit:

"Provided the provisions of this Act shall not apply to Miller County, Arkansas," and in such form was reported by the committee to the House of Representatives, and was thereupon passed by both houses.

There was no other company operating in cities of the first class under an Indeterminate Permit and there could be no such permits issued in the future, and thus said bill then became a special bill applying only to this defendant company, and as such was passed through the General Assembly.

That it was passed in a few days after it was thus amended and much less than thirty days after it became a local and special bill by said amendment.

The defendant alleges that for the reasons aforesaid said Act is void as conflicting with Article V, Section 26, of the Constitution.

The defendant further alleges that such legislative singling out of this defendant as the only company out of eight operating street railways in the state to bear the burdens therein sought to be imposed upon it was a denial to this company of the equal protection of the law and arbitrary exercise of the legislative powers, and amounts to taking of defendant's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which the defendant herein sets up and relies upon as a defense against the proceeding under said Act 680 of 1923.

Wherefore it prays that the complaint be dismissed and [fol. 22] that it be discharged with costs and for all other and further relief to which it may be entitled.

Third

That said Act 680 and the claim of the plaintiff thereunder as sued upon herein cannot be maintained for the following reasons, to wit:

The plaintiff was organized under the laws of Arkansas providing for the organization in cities and towns of improvement districts to construct public improvements with the consent of the majority in value of the owners of real property adjoining the locality to be affected. That pursuant to the authority vested in it under the laws it levied benefit assessments in said district to pay for the public improvement to be constructed, including that part now sought to be imposed upon this defendant, prior to the passage of said Act 680.

That the ascertainment of benefits is based on the enhanced value to the real estate situated in an improvement district, and the funds to construct said improvements were raised by said benefit assessments being levied. That the defendant owned no real estate in said district, its property therein consisting of rails, ties, poles and wires, and such property constituting a street railway system, all of which is personal property and as such is not liable under the Constitution of Arkansas to pay for a local improvement constructed by an improvement district.

That said Act 680 is an effort on the part of the General Assembly to enforce an assessment on personal property [fol. 23] and as such is void.

That if said Act is not as above stated, then it must be construed as an effort on the part of the General Assembly to require the defendant to pay for the privilege of operating its street car system on the streets within said district and the General Assembly cannot, under the Constitution of Arkansas, levy such privilege tax.

That if said Act 680 be construed as an exercise of the taxing power of the state delegated to the plaintiff, then the same is void as conflicting with Article XVI, Section 5, requiring property to be taxed according to value and that value to be ascertained in such manner as the General Assembly shall direct, making it uniform and equal throughout the state, and further, forbidding one species of property upon which a tax may be collected to be taxed higher than another species of equal value.

That the effort through said bill 680 to require the defendant to pay for the paving therein mentioned, the costs of which is sued upon herein, is an attempt to indirectly levy an assessment to that amount against this defendant to become a credit when collected in favor of the owners of real property within said district, upon whose property a lien existed before the passage of said Act to pay for said improvement and as such is beyond the power of the General Assembly and is void.

Defendant further alleges that the plaintiff improvement district is not vested under the law and cannot be vested under the Constitution of Arkansas with the power of regulating public utilities operating within its limits and [fol. 24] as an attempt to exercise the power of regulation the same is void.

Wherefore, having fully answered, the defendant prays to be discharged with its costs and for all further relied to which it may be entitled.

Fourth

The defendant further alleges that upon the facts set forth in paragraph 2, which it prays to be taken as part of this paragraph, that the effect of said Act 680 and the proceedings thereunder is to take the property of this defendant to pay for a public improvement without just compensation, contrary to the Fourteenth Amendment to the Constitution of the United States and contrary to Article II, Sections 8, 21 and 22 of the Constitution of Arkansas, and this defendant sets up and relies upon the said Fourteenth Amendment and said sections of the Constitution of Arkansas as a defense against said Act and the proceedings thereunder.

Wherefore the defendant prays that the complaint be dismissed and it be discharged with its costs and for all other and further relief to which it may be entitled.

Fifth

The defendant further alleges that its earnings from its street car operation is less than 2 per cent upon the value of its property used in street car service, using the taxable

valuation of the same, and that the imposition upon it of the amount herein sued for would be a deprivation of its property without due process of law, contrary to the Four-
[fol. 25] teenth Amendment, which the defendant sets up and relies upon in the defense of the proceeding under said Act 680.

Wherefore the defendant prays that the complaint be dismissed and it be discharged with its costs and for all other and further relief to which it may be entitled.

Hill & Fitzhugh, Attorneys for Defendant.

[fol. 26] In Circuit Court of Sebastian County

[Title omitted]

Judgment

Now on this 9th day of May, 1924, this cause coming on to be heard and the plaintiff being present by its attorneys, George W. Dodd and Daily & Woods, and the defendant, Fort Smith Light & Traction Company being present by its attorneys, Hill & Fitzhugh, and each of the parties in open court having waived a jury and having agreed to submit said cause to the Court sitting as a jury, and the Court having heard the evidence and argument of counsel, and being well and sufficiently advised in the premises, doth find:

That Paving District No. 16 of the City of Fort Smith is an improvement district duly organized and existing under the laws of the State of Arkansas relative to formation of improvement districts in cities and towns; that said improvement district was duly and properly created for the purpose of paving certain streets and avenues in the City of Fort Smith, Arkansas, including, among others, the following streets, to wit:

(1) Garrison Avenue from Second Street to its eastern terminus, including the intersection of Garrison Avenue with North and South Second Streets.

(2) North Third Street from Garrison Avenue to North A Street.

(3) North Fifth Street from Garrison Avenue to North A Street, including its intersection with North A Street.

That the city of Fort Smith is a city of the first class in the State of Arkansas.

[fol. 27] That the defendant, Fort Smith Light & Traction Company is a corporation duly organized and existing under the laws of the State of Arkansas and that said defendant owns and operates a street railway on, along and across a number of streets and avenues in the City of Fort Smith, Sebastian County, and also in the City of Van Buren, in Crawford County, including, among others in the City of Fort Smith, the streets and avenues specifically above mentioned.

That prior to August 15th, 1919, said defendant operated a street railway both in the City of Fort Smith and the City of Van Buren, under franchise granted to it by said cities; that on said date it surrendered its franchise in said cities in accordance with the provisions of Act No. 571 of the Acts of the General Assembly of the State of Arkansas, for the year 1919, and that on said date an Indeterminate Permit was issued to it by said Arkansas Corporation Commission, in accordance with the provisions of said Act No. 571, and that from said date down until the date of trial said defendant has operated its street railway in the City of Fort Smith and on, along and across the streets and avenues above mentioned and also in the City of Van Buren under and by virtue of said Indeterminate Permit.

That after having adopted final plans for the paving of the streets and avenues within said district said plaintiff caused to be served upon said defendant a notice in writing in exact accordance with Section 4 of Act No. 680 of the General Assembly of the State of Arkansas, for the year 1923; that service of said notice was duly accepted by said defendant and no question is raised as to the form or sufficiency thereof.

That said defendant failed and refused to do the paving specified in said notice and failed to start same within thirty [fol. 28] days after accepting service of said notice, and specifically and definitely refused to lay said pavement. That said defendant having failed and refused to start said paving said improvement district, after the expiration of thirty days, proceeded to pave said streets above men-

tioned, between the rails and to the end of its ties on, along and across said three streets, in accordance with the final plans theretofore adopted by said plaintiff, and with the material mentioned and set forth in said notice; that the amount expended by said plaintiff in paving said space between the rails and to the end of the ties of the tracks of the defendant was the sum of $11,780.19; that $11,272 97 of said amounts was paid by said paving district to the Kaw Paving Company on November 20, 1923, for actual work and material in doing said work; that $572.22 of said amount was paid by said paving district on December 13, 1923, to W. L. Winters for engineering services for supervising and inspecting said work of laying said pavement between the rails and to the ends of the ties of the tracks occupied by said defendant on said three streets.

That said expenditure so made by the plaintiff was justified and necessary under the facts; that the condition of the pavement between the rails and to the end of the ties of the tracks of the defendant on said three streets was such that it was necessary and proper for the plaintiff to do said work and to expend said sums of money. That Act No. 680 of the Acts of the General Assembly of the State of Arkansas for the year 1923 is a valid law, and the Court finds both the facts and the law in favor of the plaintiff, and further finds that under the facts and under the [fol. 29] law plaintiff is entitled to recover the amount set forth in its complaint.

It is therefore by the Court considered, ordered and adjudged that the plaintiff have and recover of and from the defendant the sumof $11,272.97, together with interest thereon at the rate of 10 per cent per annum from the 20th day of November, 1923, and the further sum of $507.22, together with interest thereon at the rate of 10 per cent per annum from December 13th, 1923, a total sum of $12,262.69, for which let execution issue.

To each of which findings of fact and each of which declarations of law and to the judgment of the Court the defendant at the time saved its separate and several exceptions.

And thereupon upon the same day the defendant having filed in open court its motion for new trial the same is by the Court overruled, to which action of the Court the de-

fendant at the time saved its separate and several exceptions and prayed an appeal to the Supreme Court, which is granted. And defendant is given and granted sixty days' time in which to prepare and file bill of exceptions.

[fol. 30] In Circuit Court of Sebastian County

Motion for New Trial

Comes the defendant herein and moves the Court for a new trial, and for cause thereof alleges:

(1) The Court erred in finding the law and facts in favor of the plaintiff.

(2) The Court erred in not finding the law and facts in favor of the defendant.

(3) The Court erred in not finding that Act No. 680, approved March 26, 1923, was void, as impairing the obligation of the contract between this defendant and the State created by Act No. 570 of 1919 and Act 124 of 1921, and the Indeterminate Permit issued under Act 571 for the reasons set forth in the first count of the defendant's answer.

(4) The court erred in not finding and declaring Act No. 680 of the General Assembly of 1923, was void, in that it was introduced in the General Assembly as a general act and was by amendment turned into a local or special act, and the record evidence of which the Court took cognizance showed that the 30 days' notice required by Article V of Section 26 of the Constitution had not been given.

(5) The Court erred in not declaring Act 680 void, in that it singled out this defendant as the only company out of eight companies operating street railways in the State of Arkansas to bear the burdens therein sought to be imposed upon it as a denial to this company of the equal protection of the law and an arbitrary exercise of the legislative powers and amounted to taking the defendant's property without due process of law, and contrary to the [fol. 31] provisions of the Fourteenth Amendment to the Constitution of the United States, which was specially set

up and relied upon in the second count of the defendant's answer.

(6) The Court erred in not declaring Act 680 void, for the reasons set forth in the third count of the defendant's answer.

(7) The Court erred in not declaring the effect of Act 680 and the proceedings thereunder to be void for the reasons set forth in the fourth count of the defendant's answer.

(8) The Court erred in not finding under the evidence that the paving for which suit was brought herein was an unnecessary burden to be placed upon the defendant.

(9) The Court erred in not finding that the paving costs which are sought to be recovered of the defendant in this action was an unnecessary burden to the defendant in that the cause of said expenditure for the said paving was brought about by the conduct of Improvement District No. 7 and the City of Fort Smith in so paving Garrision Avenue on either side of said tracks as to injure the paving done by this defendant and render a new paving necessary, when said Improvement District No. 7 and said City of Fort Smith were in such conduct acting as the agent of the property owners now represented by this plaintiff.

(10) The Court erred in not finding that the burden sought to be placed upon this defendant by the cause of action herein alleged was the taking of its property without due process of law, in that the defendant was indisputably found to be making less than 2 per cent return upon its property, and the infliction of the expenses sought to [fol. 32] be recovered herein would be taking its property without due process of law, contrary to the Fourteenth Amendment, which is specifically set up and relied upon in the fifth count of the defendant's answer.

(11) The Court erred in excluding the testimony of Sam Galloway to the effect that no notice was given of the intention to introduce House Bill No. 786 and no evidence thereof exhibited to the General Assembly.

For each and every reason the defendant prays the Court to grant it a new trial herein.

(Signed) Hill & Fitzhugh, Attorneys for Defendant.

[fol. 33] IN SUPREME COURT OF ARKANSAS

No. 8804

FORT SMITH LIGHT AND TRACTION COMPANY, Plaintiff in Error,

vs.

BOARD OF IMPROVEMENT OF PAVING DISTRICT NO. 16 OF FORT SMITH, ARKANSAS, Defendant in Error

STIPULATION RE TRANSCRIPT OF RECORD

It is stipulated by counsel pursuant to Rule 9 of the Revised Rules of Practice of the United States adopted June 8th, 1925, that the record to be certified to the United States Supreme Court in this case which is material to the issues shall be as follows, to-wit:

The Complaint; the Answer; the judgment of the Circuit Court; the Motion for a New Trial.

The material testimony was as follows, to-wit:

SAM GALLOWAY testified he was a member of the House of Representatives of the General Assembly for 1923 from Sebastian County. He introduced a bill for an Act entitled "An Act to require all persons, firms, or corporations operating a street railway system under an Indeterminate Permit to pave between its rails and to the end of its ties, and for other purposes," which became House Bill No. 786, and after it was amended it was passed and was approved as Act 680.

The defendant offered to prove by the said witness that he did not present evidence to the General Assembly that notice of the intention to introduce this bill had been given in Sebastian County, or elsewhere, for 30 days prior to its introduction, which evidence the Circuit Court declined to receive, and the defendant excepted thereto. I suppose the [fol. 34] House treated Bill No. 786 as a general bill. It was the usual custom of the House to pass a local bill whenever it only affected the County, and the member from that County favored it, as a matter of legislative courtesy.

CLAUDE THOMPSON testified he was Senator from Sebastian County in the 1923 General Assembly. House Bill No.

786, known as the Galloway Bill, same to the Senate and he took charge of it; he understood that in its present shape it only affected Sebastian County, and he told the Senate that it was a local bill, and he wanted them to pass it for him, and that was all there was to it, and it was passed.

There was a rule of Senatorial courtesy that all the Senators voted for a local bill on the request of a Senator from the locality affected, and a general bill was considered on its merits.

Certified copies of the legislative record showed that on February 22nd, 1923, Mr. Galloway introduced a bill with the title heretofore copied, which became House Bill No. 786, and it was read the first and second times and referred to the Committee on Public Service Corporations.

On March 1st, 1923, the Chairman of the Committee on Public Service Corporations reported in favor of the passage of Bill No. 786 as amended, which amendment was to add to Section 5: "Provided that the provisions of this Act shall not apply to Miller County, Arkansas."

On March 3rd, 1923, House Bill No. 786 as amended passed the House. On March 5th, 1923, House Bill No. 786 was transmitted to the Senate; and on March 6th, 1923, it was read the first and second times and made a special order for March 7th, 1923, and on said date passed the House, and on the same day the Senate announced to the House its passage. Act 680 (Clerk Copy R. P. 47.)

[fol. 34a] Act 680

An act to require all persons, firms or corporations operating a street-railway system under an indeterminate permit to pave between its rails and to the end of its ties, and for other purposes.

Section 1. It shall be the duty of every person, firm or corporation operating any street railway on, along, or across any street or avenue in any city of the first class in the State of Arkansas, under and by virtue of any indeterminate permit issued by the Arkansas Corporation Commission, to pave between its rails and to the end of its ties, whenever the portions of said streets or avenues adjacent to the portion of the street occupied by its ties and rails shall have been paved by the City, the County, or an Im-

provement District. Said space between the rails and to the end of its ties shall be paved by the person, firm or corporation, operating under said indeterminate permit, with the same class and character of material used by said City, County or improvement District in paving the other portion of said street or avenue adjacent thereto.

Said work shall be done by the person, firm or corporation holding said indeterminate permit in a good and workmanlike manner, and the pavement so laid by the person, firm or corporation holding said indeterminate permit shall be maintained by said person, firm or corporation in as good condition as the remainder of the pavement laid on said street or avenue.

In case the person, firm or corporation operating said street railway under such indeterminate permit shall deem it advisable to use a different character of material for paving that portion of any street or avenue between its rails [fol. 34b] and to the end of its ties than that used on the remainder of said street, it may present a written petition to the City Council or Commission of said City asking permission to use some other character of material and the City Council or Commission is authorized to grant said petition either by ordinance or resolution, in case, in the judgment of said City Commission or Council, the material set forth in said petition is of equal grade and durability to that used on the balance of said street or avenue.

Section 2. The tracks of any such street railway and the paving provided for in Section 1 hereof shall be laid and maintained to the grade established by said City.

Section 3. The Circuit Court of the County in which said City is located is given jurisdiction to enforce compliance of the provisions of Section 1 hereof by mandamus upon the complaint of said City.

Section 4. Whenever the City, the County, or an Improvement District shall have adopted final plans for the paving of any street or avenue occupied by such railway track, and shall have finally determined upon the material to be used, it may cause to be served upon said person, firm or corporation operating said street railway a notice, in writing, stating the character of material to be used upon the balance of said street and directing said person, firm or corpora-

tion to proceed with the work of paving between the rails to the end of its ties. In case said person, firm or corporation shall fail to start said paving within thirty days, or to complete the same within a reasonable time, then said City, County, or Improvement District, as the case may be, may cause the tracks of said street railway to be brought [fol. 34c] to grade and may construct the pavement between said rails and to the end of its ties.

The amount expended by said City, County, or Improvement District in paving said space between the rails and to the end of the ties, together with ten per cent interest on the amount of said expenditure from the date thereof may be recovered by it from the person, firm or corporation holding said indeterminate permit in an ordinary action at law.

The remedies provided for in this Section are cumulative and are in addition to the remedy for mandamus provided for in the preceding section.

Section 5. The term "pavement" as used in this Act shall include a proper foundation and all excavation, drainage, and other work necessary to properly pave said space between the rails and to the end of the ties. Provided the provisions of this Act shall not apply to Miller County, Arkansas.

Section 6. This Act being necessary for the immediate preservation of the public health and safety, shall take effect and be in force from and after its passage.

Approved March 26, 1923.

[fol. 35] And it is stipulated that Act #680 is the same as Bill No. 786, except Section 5, and that section 5 of the Bill read as follows:

"The term 'pavement' as used in this Act shall include a proper foundation and all excavation, drainage, and other work necessary to properly pave said space between the rails and to the end of the ties."

The indeterminate permit, which is copied in the answer.

It is stipulated that the defendant company was operating under various franchises which were in the form of

ordinances passed by the City of Fort Smith and accepted by it, either to the defendant company or its predecessors in title, and that all of said franchises were surrendered by the defendant company when it sought to obtain an Indeterminate Permit, and that among other provisions of the various ordinances the following are considered material herein, to-wit:

Section 1 of Ordinance No. 1, passed and approved August 2, 1881, as follows:

"That the exclusive right of way is hereby granted to the Fort Smith Street Railway Company to construct, maintain and operate a single or double track railway with all necessary tracks, turnouts, side tracks, turntables, switches and appendages, in the City of Fort Smith, for the period of thirty (30) years, in and over and along the following streets: Ozark, Wayne, Knox, Jackson, Franklin. Madison, Monroe, Polk, Garrison Avenue, Little Rock Road, Towson or Texas Road, Mulberry, Ash, Maple and Chestnut Streets, their present and future limits and extensions, upon the terms, conditions and restrictions herein contained and provided."

[fol. 36] That Section 3 of Ordinance #694, passed and approved November 20th, 1925, which in substance is granting an extension of the franchises to apply to certain streets, parts of streets, avenues and boulevard therein named, consisting of parts of 24 additional streets, or parts of streets.

Section 1, 4, 6 and 8 of Ordinance #453, passed and approved February 17, 1898, as follows:

"Section 1. That the Fort Smith Street Railway Company, its successors and assigns are hereby authorized to propel its cars with electric motors, with overhead wires or underground wires, storage battery or compressed air or by such other means as may hereafter be found preferable, except animal or steam power."

"Section 4. That the said Street Railway and its extensions shall be constructed in first class manner; and the tracks maintained in good order so as to interfere as little as possible with street travel, and the passage of vehicles

at any point upon said Railway; with suitable bridges, drains or pipes at all gutters, so as to permit the flow of water under the same; that the top rail shall conform to a plane and correspond as nearly as possible to the present street surface, and whenever the streets shall by the City authorities be graded to the established grade for the purpose of paving, the surface of said rail shall be made to correspond to such grade, and ties to be lowered sufficiently to permit paving over the same; that whenever a change of grade is made, after due notice to the Street Railway Company, the said Company shall at its own expense conform and adjust the tracks of its railroad to such changed grade, such adjustment to commence within ten days after such notice as aforesaid.

Provided, that said Street Railway Company shall, when the balance of the street is being paved at its own expense pave between the rails and tracks of said Street Railway, on all streets where tracks are now laid or may hereafter be laid, with the same material and in like manner and condition as may be authorized by ordinances, resolutions or law, and the said Street Railway Company shall at all times provide safe and suitable crossings at all cross streets for wagons and other vehicles, and that said crossing street railway and pavings shall at all times be kept [fol. 37] in safe condition and in good repair; and the said Street Railway Company shall keep its tracks in good repair between the rails."

"Section 6. That said Fort Smith Street Railway Company, and its successors and assigns, shall have the right to carry mail, express and baggage, and shall have the right to transfer, assign, consolidate or convey its rights and privileges to any person or persons, corporation or company, or its stock may be transferred to and owned by non-residents without, in any way affecting its rights, privileges and franchises, granted and conferred upon said Company by the City of Fort Smith, Arkansas; Provided, that nothing in this section shall be construed to authorize said company to transport freight or freight cars upon its lines inside the City Limits as now existing or as may hereafter be extended."

"Section 8. The fare to be charged shall not exceed five cents for each passenger carried over each line of said

Railway for one continuous trip to any point within the City Limits; pupils in actual transit to and from school shall be required to pay half fare only, and said company shall keep on sale said half fare tickets; children four years of age and under when accompanied by a person in charge shall be carried free; Provided, that said Street Railway Company may charge a fare not exceeding 10 cents for each passenger after 11 o'clock and thirty minutes P. M. and said car shall commence to run not later than 6 o'clock A. M. That police officers on duty and in uniform shall be allowed to ride free on said railway."

Section 1 of Ordinance No. 694, passed and approved on November 20, 1905, which is as follows, to-wit:

"Section 1. That the privileges and franchises granted the Fort Smith Street Railway Company and its successors and assigns, by Ordinance No. 453, passed and approved February 7th, 1898, be and the same are hereby extended, granted, given and vested in the Fort Smith Light and Traction Company, its successors and assigns, for and during the term and period of fifty years from and after the passage and publication of this ordinance:

[fol. 38] Provided, that conductors of each and every car be furnished with half fare tickets for sale on cars; and provided further, that one-half fare only shall be collected from all children between the ages of five years and not over twelve years, and under five years of age shall ride free when accompanied by a full fare passenger; and provided further, that all school children of school age in actual transit to and from school shall be entitled to the one-half fare rate. And that all paid Firemen and all Policemen when in uniform shall be allowed to ride free of charge on all of the lines.

Provided further, that no double tracks shall be allowed on any street or avenue not now occupied, except turnouts or switches which shall not exceed three hundred feet, and,

Provided further, that if the said Company, its successors, or assigns, shall enter upon any street not now occupied and where said streets or avenues are above grade, said Fort Smith Light and Traction Company, its successors or assigns, shall put said streets to grade from curb to

curb, and those below grade said streets or avenues shall be put to City Grade from curb to curb, by the said Fort Smith Light and Traction Company. That the future extensions on all streets and avenues now occupied by said Fort Smith Light and Traction Company shall be graded in conformity with city grade from curb to curb by said Company. That transfers shall be furnished when passengers request same when making one continuous trip, when demanded at the time of paying fare at point of connection or nearest point thereto. That all streets not occupied in 1918 shall be forfeited to the City of Fort Smith.

The evidence showed that the cost of paving that part of Garrison Avenue paved by the defendant in 1912, including the concrete base which was used in the present paving, was in round numbers, $50,000.00. This sum included $3,935.58 paid to Improvement District No. 7 in 1912 for the wood block pavement from the outside rails to the end of the ties.

[fol. 39] It is stipulated that the following is the historical data relating to Paving District No. 16: The first petition was presented to the City Commission on April 4th, 1922; the ordinance creating the District was passed April 12th, 1922.

The second petition showing a majority in value in favor of the improvement was presented to the City Commission on June 13th, 1922, at which time the Commission set it for hearing on June 29th, 1922. An order was given for the publication of notice on June 29th; the hearing was had, and it was found that a majority in value had signed for the improvement and the District was declared organized. The Commissioners qualified on the same day. The engineer filed his report of estimated costs on August 4th, 1922. On August 10th, 1922, the Board determined the estimated costs, inclusive of interest, to be $270,000.00. Thereupon a Board of assessors was appointed, which qualified on August 16th, 1922; they filed their report on February 2nd, 1923, showing total assessed benefits amounting to $277,747.00.

The notice of filing of the assessments was duly published and the ordinance levying the assessments as determined

by the assessor was passed February 16th, 1923, and was duly published. On February 27th, 1923, the Board of Improvement sold $150,000.00 of bonds to the highest bidder, which was $98.28 for each $100.00 par value. The actual paving construction cost paid by the District was $165,853.04, of which $11,272.97 represented the construction cost, exclusive of engineering and inspection, for paving laid within the rails and to the end of the ties, of the street car track of the defendant Company within the limits of said District.

It is further stipulated that the following are the names of the companies and cities operating street railways in the State of Arkansas: Arkansas Central Power Company, Little Rock; Central Light & Power Company, Walnut Ridge and Hoxie; Fort Smith Light & Traction Company, Fort Smith and Van Buren; Hot Springs Street Railway Company, Hot Springs; Inter City Terminal Railway Com-[fol. 40] pany, North Little Rock; Pine Bluff Company, Pine Bluff; Southwestern Gas & Electric Company, Texarkana; West Helena Consolidated Company, Helena.

It is further stipulated the evidence shows the following facts in regard to operations in the following cities, to-wit: In Little Rock the company operates 27.04 miles, and serves a population of 70,000 people. This company is not operating under an Indeterminate Permit, but under a franchise granted by the City Council of Little Rock. This franchise requires the Company to build and maintain between its rails and two feet on each side thereof a pavement of like character and material of that laid in the balance of the street. Little Rock is a city of the first class.

North Little Rock is a city of the first class and the company there has five miles of street railway and serves a population of 18,000. The company is operating under a franchise granted in 1908. The company is required at its own expense, at the same time and in conjunction with the City, to improve and keep in repair that part of the streets occupied by its tracks and for 18 inches on either side thereof, with the same material and in the same manner as that part of the streets not occupied by the said tracks shall be improved and kept in repair by the city. The Company is not required to do the paving aforesaid when the streets are paved by an improvement district, and not by the city.

All of the streets paved in North Little Rock have been paved by improvement districts, and the districts have paid for all the paving on streets occupied by street car lines, including that part between the rails and 18 inches outside thereof. The company has paid for no paving whatever.

Hot Springs is a City of the first class, and the company operates 13.64 miles, and serves a population of 15,000 people. The company is operating under a franchise, not an indeterminate permit, and the franchise requires the company to keep and maintain the space between its tracks and rails and one foot outside thereof, paved in good order and condition at the same time and in like manner, that paving of the same character should be laid on parts of [fol. 41] the streets and highways on which its tracks shall be laid.

Texarkana is a city of the first class and the Company is there operating under an Indeterminate Permit and its mileage of 5.14 miles in Texarkana, Arkansas, serves a population of 11,000 people; it alsso operates in the city of Texarkana, Texas, 6.32 miles, and serves a population in Texas of 15,000. There is no obligation resting upon the company by contract or otherwise to pave between the tracks in Texarkana, Arkansas. The City of Texarkana is situated partly in Miller County, Arkansas, and partly in the State of Texas.

At the time that the recent paving projects were put through in the City of Texarkana we came to an understanding with the city officials, as a result of which we were permitted to pave between the rails of our track and to the ends of the ties on the outside of the rails with gravel, the surface of the rails being maintained at approximately the elevation of the crown of the street. This understanding was reached after an investigation of the financial operations of the street railway system was made and it was shown that the earnings of the Company would not justify the installation of an expensive type of pavement in the space occupied by the Street Railway tracks and ties.

The city of Pine Bluff is a city of the first class, and the company there operates 13 miles, and serves a population of 25,000. The company is operating under a franchise, not an Indeterminate Permit. The Company is not required to do any paving when the streets are paved on

which its tracks are laid and it has never done so. All the paving has been done by improvement districts.

It is further stipulated that there were only two companies in Arkansas operating street railways which were operating under Indeterminate Permits, to-wit: The Fort Smith Light and Traction Company and the company operating at Texarkana in Miller County, Arkansas.

It was proved by the defendant that by taking the valuation of its street car property at which it was assessed for taxation, and multiplying same by two on the theory that property is assessed at 50%, and taking its gross receipts and expenses for the year 1923 that it was making [fol. 42] a return, after allowing 4.25% for depreciation, of 1.1719% on its said taxed value doubled. Its earnings over and above operating expenses being $69,570.48; depreciation at 4.25% being $57,647.68, which left a balance for interest charges and profit, of $11,922.80, making the return on the taxing value doubled as aforesaid; and that property is theoretically assessed on a 50% basis, but in fact less.

The defendants introduced testimony of three engineers tending to prove that if there had been about $1,600.00 spent on repairing the brick pavement which was constructed by the defendant in 1912 on Garrison Avenue, that the condition of said pavement would then have been better than the relaid pavement as constructed by the plaintiff district and for the cost of which this suit in part is brought.

On the other hand the plaintiff district introduced testimony of three engineers to the effect that the repairing of the condition of the pavement on Garrison Avenue would have cost five or six thousand dollars and when repaired it would not have been as good as the pavement which has been constructed by the plaintiff district, but on the contrary would have been a patched up job, and would not have been fit to be part of a new pavement. One of these Engineers testified that to repair this pavement in the manner suggested by defendant's engineers would have cost more than using the method followed by plaintiff.

The defendants also introduced testimony of its engineers to the effect that before the new work was done by the plaintiff, Paving District No. 16, the brick pavement between the rails and to the end of the ties on North 5th

Street was very badly worn and rough in places, and there were more or less bumps over each tie, and that on North 3rd Street between the rails and to the end of the ties, and on the balance of the street the bricks were broken up and there was practically no pavement there.

They also testified that on Garrison Avenue the brick pavement before the new paving was done by the plaintiff District, was in very bad shape. It was rough and was not in such condition as to be used again to make it a part of the new paving; that it had been necessary to go in and [fol. 43] loosen the brick on the inside of the rails in order to straighten the rails, and that at practically every joint the defendant had been in there and welded an electrical connection and spliced plates on the rails at a good many places, also at practically every point where they had removed the iron trolley poles from the center of Garrison and had replaced it with pavement, that the pavement where it had been replaced had settled and there were depressions at these points. In addition to this the brick as laid between the rails was higher than the rails themselves, with the result that automobiles crossing over the tracks at street intersections would receive a rough jar and had to slow down at each street intersection and go over the tracks slowly; that the bad places, testified by them, were in addition to the bad places near 5th street and Towson Avenue, where the Traction Company had crossed over; that the condition about which they testified applied more or less from 2nd to 11th Street. From 11th to 13th streets conditions were not so bad. They testified that the condition of the pavement between the rails on Garrison Avenue was such that it could not be used as a part of the new pavement, while it is now laid properly. As the work was done by the plaintiff District the brick between the rails is laid flush with the balance of the street.

These engineers further testified that when the plaintiff District started work that the defendant in order to respike its rails, tore up the brick along the rails on Garrison Avenue in numerous places and that this would have necessitated work of some character being done to put the pavement back in shape.

These engineers further testified that it is their judgment, based upon observation in Fort Smith and elsewhere,

that it is much more difficult to maintain a pavement along street car tracks than elsewhere, and that where the same character of pavement is laid between the rails and on the balance of the street that the pavement along the rails gets rough and in bad shape first. They also testified that starting from the ground up it costs a good deal more to [fol. 44] lay pavement on streets where there are street car tracks than on streets where there are no car tracks. They testified that the reason that pavements get bad along car tracks first is due to the operation of the street cars over the tracks; that it is caused by the vibration of the street cars. The present Paving District No. 16 had noth-to do with the laying of the old wooden block pavement in 1912; that with reference to the testimony that the brick pavement between the rails on Garrison Avenue would have probably lasted 15 or 20 years if properly maintained, said pavement had not been properly maintained by the Traction Company; that the Traction Company had not properly maintained the brick pavement between the rails on Garrison Avenue, in that when they went to straighten up the rails they did not restore it to its original condition; that they were not positive whether the bad joints were caused by the pressure of the wooden block pavement or by the movement of the cars; that they would not say if the balance of the street had been in as good condition in 1923 as that between the tracks, that it would not have needed repaving in 1923; that the paving along the track in places was pretty rough; that repairing it would not have been sufficient in order to get a uniform pavement over the whole street, and that by repairing it would be higher than the balance of the street. That the brick between the rails were three-quarters of an inch higher than the balance of the street; that it is probable that if the balance of the street had been in as good condition as that between the rails there might not have been any repaving in 1923; that to have done a proper repairing job between the rails would have cost at least $3,000.00 or $4,000.00. The work which the plaintiff District did between the rails was this: they took up the brick, cleaned them, relaid them in such a way that they were flush with the balance of the street, poured an asphalt filled on them. The cost of this 80¢ a square yard, or a total of $6,381.68. The balance of Gar-

rison Avenue from the street car rails to the curbing was [fol. 45] paved with new brick, with an asphalt filler. The cost of this new paving was $2.19 a square yard. There was a charge by the plaintiff to the Traction Company at this price for a strip 18 inches wide being from the rail to the end of the ties. Plaintiff has charged the Street Car Company for this 18 inch strip just what it cost, and just what the property owners are paying for the balance of the street.

The Engineer of the plaintiff who was in immediate charge of the construction testified that when the paving work was started by plaintiff District No. 16 the old pavement between the rails and to the end of the ties on 5th and 3rd streets were practically useless; that when Paving District No. 16 started the work on Garrison Avenue the condition of the brick pavement between the rails on Garrison Avenue was that the majority of the joints of the brick had been opened and the tracks torn up and relaid and the bricks were relaid cross-ways and laid back without filling up. This was true of about 75% of the joints on the outside rails and between 40 and 50% of the joints on the inside rails. The Traction Company had done this in going in to fix the joints. They had not put the brick back in the way in which they had originally been laid. This had made bumps and depressions. There were also holes in the center of this brick pavement where the old iron trolley poles had been taken out, and the pavement which had been laid over these places had sunk. This Engineer further testified that when Paving District No. 16 started on the balance of the street that the defendant Traction Company removed the entire track on Garrison Avenue at the cross over from 10th street up to about 11th street and that from 10th street to 2nd street they tore up at least three brick wide along the outer rails and re-spiked the rails and lined up the rails and laid the brick back cross-ways. They did not attempt to line up the brick and straighten them. The lower end of these tracks were down in two or three places below the average paving. It was absolutely ruined as a pavement when the Traction Company had done this work.

After the Traction Company had done this work they could not possibly have fixed it for less than 80¢ per square yard, for which the work was actually done for Paving Dis-

trict No. 16. In other words it was done as cheaply as it [fol. 46] could be done. Garrison Avenue, as finally laid by Paving District No. 16, is a uniform job from curb to curb, laid with the same character of material and absolutely smooth.

The cost of the work done by the plaintiff, Paving District No. 16, between the rails and to the end of the ties of the defendant on the three streets in question is made up of the following items:

1. One block on North 5th Street	$789 96
2. One block on North 3rd Street	676 61
3. Replacing wood block pavement with new pavement from outside of rails to end of ties (18 inches), on eleven blocks on Garrison Avenue	3,424 72
4. Taking up, cleaning, relaying with asphalt filler, the brick between rails on eleven blocks on Garrison Avenue	6,381 68
5. Engineering at 4½ per cent on above item	507 22
Total	$11,272 97

The defendant proved by the plaintiff engineers on cross examination the following facts, which was undisputed testimoney. That in 1912 the defendant company paved with brick between its rails on Garrison Avenue, and that it was first class pavement throughout. It was standard up-to-date pavement at that time. Such a payment without any disturbance from street car traffic would have a life of 15 to 20 years. Such a pavement properly maintained and with proper replacements might have lasted 25 years. The wooden blocks which were put down by Paving District #7 (part of the expense of which was paid by the City of Fort Smith) began to squeeze the brick pavement put down by the defendant company shortly after it was constructed. This produced a pressure sufficient to cause and produce a lateral pressure toward the track and curb and had the effect of derailing cars and breaking the axle of the cars which used the railway tracks. This condition was a constant expense to the defendant company. That this expense has now been eliminated by the plaintiff in paving the entire street with brick.

Paving District No. 7 (and the City) which put down the wooden pavement in 1912, which extended from the street car tracks in the middle of Garrison Avenue to the curb, obtained a very poor job. The errors were in the specifications, and in the engineering and in the class of [fol. 47] wooden block pavement.

Inadequate specifications, the block not properly creosoted, and the sand filler between the blocks allowed the water to percolate. It was a very poor and inadequate pavement. Wooden block pavement is a standard pavement if properly put down and properly constructed.

If it had been properly put down and properly constructed probably there would have been no necessity for repaving in 1923, the brick pavement between the rails of the street car tracks.

In recent years after the wooden block pavement became so bad, most of the traveling on Garrison Avenue was on the brick pavement put down by the Fort Smith Light & Traction Company. It was that part of the street that was in most general use by the public prior to the repaving in 1923. If the balance of the street had been in as good condition as the brick pavement put down by the said Traction Company in 1912, there probably would have been no repaving of the entire street in 1923.

The total population served by the defendant company is about 40,000.*00*. Garrison Avenue where eleven of the thirteen blocks of this paving is laid is the main business thoroughfare of Fort Smith; it carries the principal part of the traffic of the town; it is practically the only business street of the town and is solidly built up with business houses on both sides, and all of the street car runs in Fort Smith converges on to Garrison Avenue, and nearly all the cars traverse Garrison Avenue.

The pavement between the rails on Garrison Avenue as originally put down by the Street Car Company in 1912 was a good job and first class paving, but there were objectionable features, as it was built with a crown somewhat higher than suited automobile traffic, but it was a serviceable pavement, and was fairly serviceable pavement when Paving District No. 16 started its work, but needed thorough re- [fol. 48] pairs, most of these repairs needed was due to the swelling *of t*he heaving of these wooden blocks and part

was due to the working out of the joints of the rails. The heaving of these wooden blocks was an expensive thing to the street car company. The work done by plaintiff has eliminated this expense.

The paving other than that the brick pavement done by the street car company on Garrison Avenue in 1912 was a bad job; It was done by Improvement District #7 and was a wood Block pavement. It is a fact that the brick pavement on Garrison Avenue done by the Company in 1912 was in better condition in 1923, when it was taken up and relaid than the brick pavements in the city, on other streets generally speaking, and there were about 50 miles of brick pavement on other streets in the city at that time. The brick pavement between the rails on Garrison Avenue was in fair usable condition when it was repaired in 1923, although Garrison Avenue outside of it was in horrible shape.

Between the tracks was so much better than the other part of the street, which was wood block, that the traffic went upon it.

This is all the material testimony in the case.

And it is further stipulated that the opinion of the Court, motion for rehearing and the amendment to the opinion on the overruling of said motion and all the record of this Court shall be inserted in the record.

Given under our hands this 6th day of January, 1926.

Joseph M. Hill, Henry L. Fitzhugh, Attorneys for Plaintiff in Error. Harry P. Daily and John P. Woods, Attorneys for Defendant in Error.

[fol. 49] Order setting cause for argument September 28, 1925, omitted in printing.

Submission of Cause October 12, 1925, omitted in printing.

[fol. 50] IN SUPREME COURT OF ARKANSAS

[Title omitted]

JUDGMENT—October 19, 1925

This cause came on to be heard upon the transcript of the record of the circuit court of Sebastian County, Fort Smith District, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, in all things, affirmed with costs, and that said appellee recover of said appellant and of Fidelity & Casualty Company of New York, surety in the supersedeas bond filed in this cause, the sum of twelve thousand seven hundred and forty dollars and sixteen cents, being the amount of the judgment of said circuit court and 10% interest on $11,272.97 thereof from the 20th day of November, 1923, and on $507.22 thereof from the 13th day of December, 1923, to the date of said judgment, May 5th, 1924, and that this judgment bear interest at the rate of ten per cent per annum from said 5th day of May, 1924, until paid, the rate of interest provided in said circuit court judgment.

It is further considered that said appellee recover of said appellant and said surety all its costs in this Court and the Court below in this cause expended, and have execution thereof.

[fol. 51] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER ENLARGING TIME—November 2, 1925

The appellant having filed a petition for rehearing and desiring to file a supporting brief, is allowed by the Court one week from date in which to file such brief.

Submission of petition for rehearing November 9, 1925, omitted in printing.

IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER OVERRULING PETITION FOR REHEARING—November 30, 1925

Being fully advised, the petitions for rehearing filed in the following causes are by the Court severally overruled, viz:

* * * * * * *

8804. Fort Smith Light & Traction Company v. Board of Improvement of Paving District No. 16 of Fort Smith; opinion amended.

[fol. 52] Petitioner for Rehearing, covering 1 page filed October 29, 1925, omitted from this print. It was denied and nothing more by order November 30, 1925.

[fol. 53] IN SUPREME COURT OF ARKANSAS

OPINION—October 19, 1925

[Title omitted]

HUMPHREYS, J.:

This suit was instituted by appellee against appellant in the Fort Smith District of Sebastain County under authority of Act No. 680 of the Acts of 1923, to recover $11,272.97 for paving that portion of certain streets occupied by appellant's street railway. The act, as originally introduced, was general in its nature, applying to all street railways of a certain class in the State, but as finally passed, was a local act, aimed at the street railway system being operated in the Fort Smith District of Sebastian County, and in a part of Crawford County. The act, as passed, imposed the duty

on appellant company, and under certain conditions and upon notice, to pave the streets between its rails and to the end of its ties; and upon failure to do so, permitted the improvement district in which the tracks were laid to pave the spaces between the rails and to the ends of the ties at the expense of the street railway company. Appellee complied with all the provisions of said act. Appellant refused to comply with the notice and to do the paving. Appellee then paved that portion occupied by the street railway of appellant at a cost of $11,272.97.

The cause was submitted to the court, sitting as a jury, upon the pleadings and testimony, from which the court made the following finding. "That the expenditure so made by the plaintiff (appellee) was justified and necessary under the facts; that the condition of the pavement between [fol. 54] the rails and to the end of the ties of the tracks of the defendant (appellant) on said three streets was such that it was necessary and proper for the plaintiff to do said work and to expend said sums of money."

Appellant's main defense to the action was the alleged invalidity of Act No. 680 of the Acts of 1923, which was made the basis of the suit. Appellant attacked the constitutionality of the act upon the grounds: first, that notice of the intention to apply for the act was not given in the locality to be affected thirty days prior to the introduction of the bill into the General Assembly as required by Article V, Sec. 26 of the Constitution of Arkansas; second, that the Act offends against the Fourteenth Amendment to the Federal Constitution and the State Constitution in being an arbitary classification in operating on one company alone, while another company in the same classification is exempted from its terms; and third, that the act was in violation of the Federal and State Constitutions prohibiting the impairment of the obligations of contracts.

(1) The Act in question was a local bill passed at a regular session of the Legislature. It is true that it was introduced as a general bill and by amendment converted into a local bill, but this does not prove that notice was not given in apt time that application would be made for the local bill. Many general bills are converted by amendment into local bills before passage, and the presumption must be indulged that proper notice was given under the rule announced in

Caraway v. State, 143 Ark. 48. The rule is that where opportunity existed for giving the notice, it must be presumed that it was given.

[fol. 55] (2) The Act does not offend against the Clause of the Constitution inhibiting discrimination between parties similarly situated because there is only one street railway in that particular locality. There is no other street car line in that particular locality to be classified; so the doctrine of classification has no application.

(3) Prior to the passage of Act No. 571 of the Acts of the General Assembly of 1919, appellant operated its street railways system under charters from the cities of Fort Smith and Van Buren, which were of a contractual nature, made subject, however, to Art. 12 Sec. 6 in our State Constitution. Camden v. Arkansas Light & Power Co., 154 Ark. 205. Under the provisions of said Act 571 of 1919, appellant surrendered its charter rights and accepted an indeterminate permit from the State to operate its street railway system and is still operating its system under said permit. Learned counsel for appellant now contend that appellant exchanged its privileges and burdens under its original franchises of the cities for its indeterminate permit to do business, and that the State could not thereafter impose any of the original burdens contained in the franchises upon it without impairing the obligation of its contract with the State, and that Act No. 680 of 1923, which imposes the duty of paving the streets between its rails and to the ends of its ties, is void because repugnant to the clauses of the Federal and State Constitutions, prohibiting the impairment of contracts. We cannot agree with counsel in this position. The indeterminate permit was granted, just as the original franchises, subject to Art. 12, Sec. 6 of our Constitution, which is as follows:

[fol. 56] "The General Assembly shall have the power to alter, revoke and annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or any that may be hereafter created, whenever, in their opinion, if may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporation."

A statute of Connecticut similar to Act No. 680, Acts of 1923, was upheld as being within the reserve powers of the State to amend charters which had theretofore been issued to corporations to do business therein. Fair Haven & W. R. Co. v. New Haven, 75 Conn. 442, affirmed by the Supreme Court of the United State in Fair Haven & Westville Rd. Co. v. City of New Haven, 203 U. S. 379. Learned counsel for appellant contend, however, that because "corporations may be formed under general law, which may, from time to time be altered or repealed," Sec. 6, Art. 12 of the Constitution; and because "the General Assembly shall pass no special act conferring corporate powers," except in certain cases, Sec. 2 Article 12 of the Constitution, that the General Assembly cannot amend charters by special or local act. The inhibition is that the General Assembly cannot confer corporate powers by special act. The act in question did not attempt to confer corporate powers upon appellant but to impose a burden within the reserve powers of the state upon it. The Constitution does not prohibit this from being done. Of course, the reserve power of the state to alter, revoke, or annul charters issued to corporations has its limitations. It was said in the case of Davis, State Bank Commr. v. Moore, 130 Ark. 135, "That provision of the Constitution, has been construed by this court to empower the lawmakers of the State to amend or re- [fol. 57] voke charters granted to corporations, without any restrictions except that 'no injustice shall be done to the corporators.'" In discussing the exercise of this reserve power, other courts have said that alterations in the charters must be reasonable; that they must be made in good faith; that they must be consistent with the scope and object of the act of incorporation and that such burdens must not be imposed through oppression or wrong. We have examined the record carefully and do not think that the burden imposed by said Act No. 680, Acts of 1923, are unreasonable or that they were imposed in bad faith, or through oppression and wrong. The burden laid by this act was just such a burden as the franchises imposed under which appellant operated and with which it had complied before it surrendered them and accepted the indeterminate permit. The proof revealed that some of the street railways operated in the State are compelled to pave the streets between their tracks and to the ends of their ties when the streets in

which they operate are required to be paved. It appears that the work was done in an economical manner. The old foundation between the tracks on Garrison Avenue was utilized. There is evidence tending to show that the condition of the pavement between the tracks needed rebuilding. The evidence is sufficient to support the findings of the court.

No error appearing, the judgment is affirmed.

[fol. 58] IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed January 8, 1926

To the Honorable E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas:

Comes your petitioner, Fort Smith Light and Traction Company, the appellant in the above action lately pending in this Court, wherein Paving District #16 of the City of Fort Smith, Arkansas, was the appellee, in which action judgment was rendered against your petitioner on October 19, 1925, and which judgment became final on November 30, 1925, when the petition for rehearing was denied, and petitioner alleges that the decision of this court was against the contentions set up by your petitioner in the Circuit Court and in this Court, and denied it the rights and privileges which it specially set up and claimed under the Constitution of the United States, and held valid Act 680 of the General Assembly of 1923, approved March 26, 1923, under which Act the aforesaid action was brought against your petitioner in the Circuit Court of Sebastian County, Fort Smith District, wherein a judgment was rendered against it therein and which was affirmed by the Supreme Court of Arkansas finally on November 30, 1925, which judgment and which said affirmance your petitioner contends will deprive it of its property without due process of law and amounts to taking its private property for public use without compensation, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States

specially set up and relied upon in your petitioner's answer, and that said Act amounted to an impairment of the obligation of the contracts existing between your petitioner and the State of Arkansas, under and pursuant to Act 571 of [fol. 59] the General Assembly of 1919, and Act 124 of the General Assembly of 1921, which rights were specially set up and relied upon in your petitioner's answer.

Your petitioner further avers that said Act 680 was an arbitrary exercise of the legislative power, contrary to the Fourteenth Amendment to the Constitution of the United States, and the decision of the Supreme Court of Arkansas in holding same to be valid, deprived your petitioner of its property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which things more fully appear from the assignment of errors filed herewith.

Wherefore, your petitioner prays that writ of error may be issued in this cause to the Supreme Court of Arkansas for the correction of errors complained of, and that a transcript of all of the record, proceedings and papers in this cause, duly authenticated by the clerk of the Supreme Court of Arkansas, may be sent to the Supreme Court of the United States as provided by law.

Dated this 26th day of December, 1925.

Jos. M. Hill, Henry L. Fitzhugh, Attorneys for Plaintiff in Error.

Upon the consideration of the above and foregoing petition for writ of error it is ordered that said writ of error issue, and that said writ of error operate as a supersedeas upon the execution and approval by the undersigned of a bond for that purpose in the sum of $15,000.00, and that at the same time the petitioner presented its bond properly conditioned to operate as a supersedeas with good and sufficient surety, which bond is hereby approved, dated this, the 7 day of January, 1926.

E. A. McCulloch, Chief Justice Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 60] IN SUPREME COURT OF ARKANSAS

WRIT OF ERROR—Filed January 8, 1926

The President of the United States of America to the Honorable the judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings and in the affirmance of a judgment of the Sebastian Circuit Court, for the Fort Smith District, as also in the rendition of the judgment of a plea which is in the Supreme Court of Arkansas before you, being the highest Court of law or equity, of said State in which a decision could be had in the suit between the Fort Smith Light and Traction Company, appellant, and Board of Improvement of Paving District #16 of the City of Fort Smith, Arkansas, Appellee, wherein was drawn in question the validity of an Act, #680 of the General Assembly of 1923, approved March 26, 1923, on the ground that said Act was repugnant to Section 10 of Article I to the Constitution of the United States and repugnant to the Fourteenth Amendment to the Constitution of the United States, and the decision was in favor of the validity of said Act, and said action being brought under and pursuant to the provisions of said Act and the right, title, privilege and immunity under the Constitution of the United States was claimed by the said Fort Smith Light and Traction Company, and the decision was against the right, title, privilege and immunity specially set up and claimed under said Constitution as shown by the complaint of the said Fort Smith Light and Traction Company.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have [fol. 61] the same in the said Supreme Court at Washington, within 30 days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this the 8th day of January, 1926.

Sid. B. Redding, Clerk of the United States District Court for the Eastern District of Arkansas, by W. P. Feild, D. C. (The seal of the District Court of East. Dist. Ark., Western Division, U. S. A.)

Allowed by E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[fol. 62] IN SUPREME COURT OF ARKANSAS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 8, 1926

Now comes the Fort Smith Light and Traction Company, petitioner herein, the appellant in this Court, wherein a judgment was rendered against it in the Supreme Court of Arkansas on the 19th day of October, 1925, and which became final on the overruling of the petition for rehearing on November 13th, 1925, and says that in the record aforesaid there is manifest error, and in connection with its petition for writ of error states that the errors therein which it intends to rely on at the hearing are as follows, to-wit:

First. The Supreme Court of Arkansas erred in holding and deciding that Act 680 of the General Assembly of 1923, approved March 26, 1923, (Printed Acts, page 373) "Does not offend against the clause of the Constitution inhibiting discrimination between parties similarly situated," therein and thereby holding that said Act was not a denial to this petitioner of equal protection of the law, and that it was not an arbitrary exercise of the legislative powers, and amounted to taking of this petitioner's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, which was specifically set up and relied upon in the second count of this petitioner's answer wherein it was alleged that said Act was void as offending the provisions of said Fourteenth Amendment.

[fol. 63] Second. The Supreme Court of Arkansas erred in holding and deciding that Act 680 of the General Assembly of 1923, approved March 26, 1923, did not impair the obligation of a contract existing between the State and this petitioner through and under the operation of Act 571 of the General Assembly of 1919 authorizing this petitioner to surrender its franchises and receive and operate its public utility business under an Indeterminate Permit, and also impaired the obligation of a contract existing between the State and this petitioner under and pursuant to Act 124 of the General Assembly of 1921, authorizing this petitioner to have its franchises re-instated or continue to operate under an Indeterminate Permit subject to regulations therein provided, which said Acts, and each of them, authorized a contract which was made by the acceptance of its terms by this petitioner, and which said contract was immune from violation under Section 10 of Article I of the Constitution of the United States, which Section and Article were specially set up and relied upon by this petitioner in the first count of its answer as ground for declaring said Act void.

Third. The Supreme Court of Arkansas erred in holding and deciding that said Act 680 of the General Assembly of 1923, was valid as an exercise of the power of the State to alter, revoke or annul any charter of incorporation whenever it may be injurious to the citizens of the State in such a manner, however that no injustice should be done to the corporators; for the following reasons, to-wit:

(a) That said Act so construed amounts to taking of the petitioner's property to pay for public improvements without just compensation, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, which was specially set up and relied upon in such regard in the fourth count of the petitioner's answer as rendering said Act void.

[fol. 64] (b) That said Act did not purport to be an amendment of the petitioner's charter and being declared by the Court a local act, could not operate as an amendment to the charter of a corporation without violating Sections 2and 6 of Article XII of the Constitution of Arkansas and the

decision of the Supreme Court of Arkansas in sustaining the same was a discrimination against this petitioner, thereby denying it the equal protection of the law which was set out and relied upon in the petitioner's answer as ground for holding said Act void as against the Fourteenth Amendment to the Constitution of the United States.

(c) That said Act so construed amounted to the deprivation of petitioner's property without due process of law, specially set up and relief upon in the fifth count of petitioner's answer as rendering said Act void.

Fourth. The Supreme Court of Arkansas erred in not holding said Act 680 of the General Assembly of 1923 "The result of arbitrary or wholly unreasonable legislative action" and thereby void under the Fourteenth Amendment to the Constitution of the United States.

Fifth. The Supreme Court of Arkansas erred in not holding Act 680 of the General Assembly of 1923 as an arbitrary, oppressive, partial and unequal exercise of the legislative power, and if it was an attempted exercise of the police power, would be void as such because contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Sixth. The decision of the Supreme Court of Arkansas in sustaining Act 680 of the General Assembly of 1923, on the ground of it being an amendment of the charter of the petitioner constitutes an evasion of the petitioner's constitutional rights set up in its answer in that said act did not purport to be, and was not, intended as an amendment of charters which under the Constitution of Arkansas can only be amended by a general Act, not a special one, and the Court in so sustaining it does so in the guise of the construction of the local constitution and the construction of a local act, [fol. 65] when in fact the imposition provided for in said Act against the petitioner amounts to the taking of the private property for public use without just compensation and taking of petitioner's property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States, and as an impairment of the petitioner's contractual rights, contrary to Section 10 of Article I of the Constitution of the United States, which con-

stitutional provisions are specially set up and relied upon in the petitioner's answer.

Seventh. The Court erred in not holding said Act 680 of the General Assembly of 1923 to be void as an attempt by the Legislature to make a retroactive payment upon special assessments theretofore levied against real estate to pay for the public improvement of Paving District #16 of the City of Fort Smith, Arkansas, thereby taking petitioner's property for public use without compensation, contrary to the Fourteenth Amendment to the Constitution of the United States.

Give under our hands this the 18th day of December, 1925.
Jos. M. Hill, Henry L. Fitzhugh, Attorneys for Petitioner, now the Plaintiff in Error.

[File endorsement omitted.]

[fol. 66] Bond on writ of error for $15,000, approved and filed January 8, 1926, omitted in printing.

[fol. 67] Citation in usual form, showing service on Harry P. Daily and John P. Woods, filed January 8, 1926, omitted in printing.

[fol. 68] Certificate of lodgment omitted in printing.

[fol. 69] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 70] Clerk's return to writ of error omitted in printing.

[fols. 71-73] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFF IN ERROR OF PARTS OF THE RECORD TO BE PRINTED, WITH PROOF OF SERVICE—Filed January 25, 1926

The points relied upon are set out in the Assignment of Errors, to-wit:

Assignments of error omitted; printed side page 62 ante.

[fol. 74] The record by stipulation under Rule IX has been limited to so much thereof as is necessary to present the points relied upon, and therefore all of it is to be printed.

Joseph M. Hill, Henry L. Fitzhugh, Attorneys for Plaintiff in Error.

Service accepted this 22nd day of January, 1926.

John P. Woods, Harry P. Daily, Attorneys for Defendant in Error.

[fol. 75] [File endorsement omitted.]

Endorsed on cover: File No. 31,615. Arkansas Supreme Court. Term No. 892. Fort Smith Light and Traction Company, plaintiff in error, vs. Board of Improvement of Paving District No. 16 of the City of Fort Smith, Arkansas. Filed January 18th, 1926. File No. 31,615.